Supreme Court, U.S.
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No. 96-

In The

Supreme Court of the United States

October Term, 1996

ELLEN F. COOKE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

DIANE K. WEEKS
32 Mercer Street, Suite F-2
Hackensack, NJ 07601
(201) 343-5665

Counsel to Petitioner Ellen F. Cooke

Of Counsel

CACHERIS & TREANOR
1100 Connecticut Avenue, NW
Washington, DC 20036

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Whether *Koon v. United States*, 116 S. Ct. 2035 (1996), overruled numerous courts of appeals' "structure and theory" approach to the United States Sentencing Guidelines such that a district court on the basis of its institutional experience can *ignore* the United States Sentencing Commission's specific evidentiary standards for encouraging Theft and Fraud departures (set forth in binding Policy Statements or authoritative Commentaries), can adopt a *less onerous* burden of proof, and then grant its own three-level upward departure motion, nearly doubling defendant's sentence for embezzlement and tax evasion while she was Treasurer of the Episcopal Church?

2. Whether *Koon v. United States*, 116 S. Ct. 2035 (1996), also overruled settled multi-circuit precedent scrutinizing the reasonableness of departure under the light of the Guidelines' "structure and theory" such that a district court may give *no reasons whatsoever* (and have no reasons) for the amount and extent of departure and, thereafter, exercise unfettered discretion in placing defendant, who embezzled $2.2 million, on the same sentencing plane as a first-time offender who had stolen as much as $40 million?

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The judgment order of the court of appeals and its order denying rehearing and suggestion for rehearing in banc are all unreported. Together with the judgment and conviction order and selected portions of the sentencing transcript, setting forth the district court's reasoning for the departure, they are reprinted in Petitioner's Appendix. ("Pet. App.")

JURISDICTION

The court of appeals entered a judgment order denying petitioner's appeal on February 26, 1997 (Pet. App. 1-4) The court of appeals denied a petition for rehearing and suggestion for rehearing in banc on March 27, 1997. (Pet. App. 5-6) Petitioner respectfully invokes the jurisdiction of this Court under 28 U.S.C. §1254(1).

STATUTORY AND GUIDELINES PROVISIONS INVOLVED

Petitioner has set forth pertinent portions of Title 18, United States Code, and the United States Sentencing Guidelines ("Guidelines") in the Pet App. at 40-48.

STATEMENT

Petitioner Ellen F. Cooke pled guilty on January 24, 1996, pursuant to a written plea agreement (the "Plea Agreement"). The two-count Information charged petitioner with interstate transportation of approximately $76,000 in stolen or embezzled property in violation of 18 U.S.C. §2314 and tax evasion in violation of 26 U.S.C. §7201. (Pet. App. 7) These acts took place during her

tenure as Treasurer of the administrative body of the Protestant Episcopal Church in the United States (the "Church").

The government and petitioner stipulated in the Plea Agreement, *inter alia*, to application of U.S.S.G. §2B1.1, *Larceny, Embezzlement, and Other Forms of Theft;* to relevant conduct of $1.5 to $2.2 million embezzled from the Church; a two-level adjustment for "more than minimal planning," U.S.S.G. §2B1.1(b)(4)(A); a two-level adjustment for "abuse of trust" and use of a position of special skill to facilitate and conceal the crime, U.S.S.G. §3B1.3, *Abuse of Trust or Use of a Special Skill;* and a three-level decrease for acceptance of responsibility, U.S.S.G. 3E1.1(a) and (b), *Acceptance of Responsibility.* The parties agreed to reserve the right at sentencing to argue for or against grouping of the embezzlement and tax counts under U.S.S.G. §3D1.2, *Groups of Closely Related Counts.* (Pet. App. 49-50) The district court unconditionally accepted the Plea Agreement and petitioner's guilty plea pursuant to it.

On July 10, 1996, the district court sentenced petitioner to a term of sixty (60) months' imprisonment. (Pet. App. 7-16) This sentence included the offense level for embezzlement, (adjusted four levels to reflect "abuse of trust" and "more than minimal planning") and a two level increase for the non-grouped tax evasion count. The district court further increased petitioner's Total Offense Level from 21 to 24 by granting its own upward departure motion on grounds allegedly not considered by the United States Sentencing Commission (the "Commission") in its promulgation of the Guidelines. The district court relied upon its "normal experience" (Pet. App. 28-29) and a letter sent by Church executives (the

"Church Letter") detailing two monetary and one non-monetary harms:

(1) a decrease in contributions by Episcopalians to the Presiding Bishop's Fund for World Relief that the Church nevertheless conceded as unrelated to petitioner's embezzlement;

(2) a decline in diocesan contributions to the administrative arm of the Church because of diocesan distrust of Church's financial management; and

(3) a "psychic impact" upon (a) Church staff who resented petitioner's management style or (b) discharged Church employees who blamed, without just cause as the Church Letter acknowledged, petitioner's embezzlement for their unemployment. (Pet. App. 31-33, 51)

Without any proof, the Church Letter attributed these "alleged" harms to petitioner's crimes. *Id.* The Church did not attempt to quantify the additional harm allegedly caused by petitioner's offense conduct.

The Church Letter asserted that these monetary and non-monetary factors combined to merit a less than minimal sentence. The Church Letter *did not urge* an upward departure. (Pet. App. 51)

Petitioner strongly objected to any reliance upon the Church Letter which lacked sufficient indicia of probable accuracy. (Pet. App. 17) *See* U.S.S.G. §6A1.3, *Resolution Of Disputed Factors,* (Policy Statement).

First, the unsworn Church Letter lacked any specific facts detailing or quantifying the alleged monetary and non-monetary harms. (Pet. App. 18, 25) *Cf.* U.S.S.G. §2F1.1, *Fraud and Deceit,* Commentary, App. N. 7(c) and 10(a-c) and (e); U.S.S.G. §5K2.3, *Extreme Psychological*

Injury (Policy Statement); U.S.S.G. §5K2.5, *Property Damage or Loss,* (Policy Statement); and U.S.S.G. §5K2.7, *Disruption of Governmental Function,* (Policy Statement) (requiring proof of substantial or significant impacts, proximate cause or specific intent to cause harm).

Second, it failed to allege, let alone prove, any causal connection between petitioner's offense conduct and the aggravating factors beyond mere *post hoc, ergo propter hoc* reasoning. *Cf.* U.S.S.G. §2F1.1, *Fraud and Deceit,* Commentary, App. N. 7(c) and 10(a-c) and (e) (direct or proximate causation). For example, petitioner pointed out that one could attribute a decrease in contributions to a disaster fund because of a decline in the number of disaster appeals rather than to petitioner's embezzlement. (Pet. App. 12) Similarly, the Church executives themselves bore responsibility for demoralization of present and former Church employees because petitioner's embezzlement occurred on their "watch." (Pet. App. 23)

Third, petitioner specifically attacked each and every allegation of harm. The 1995 Annual Report for the Presiding Bishop's Fund for World Relief showed a surplus, and not a loss, at the end of the Fund's last reported fiscal year. (Pet. App. 18-19) Moreover, any harm to the Fund was irrelevant (or not causally connected to petitioner's offense conduct) because petitioner did not embezzle from that Fund. *Id.* As for the claim of a shortfall in diocesan contributions, the Church's own Budget Handbook for the 71st General Convention established Church policy in 1990 as the *affirmative* discouragement of diocesan contributions. (Pet. App. 21-22) Thus, the Church Letter could not properly attribute to petitioner the very decline the Church hierarchy had discouraged. As for "psychological injury," petitioner noted staff

demoralization over petitioner's management style as the result of her diagnosed bi-polar cyclothymia (or manic-depression) and not her embezzlement. Nor could employees reasonably complain about the embezzlement's "psychic" impact as "atypical" because such embarrassment, if any, arises as a natural consequence of petitioner's offense conduct (and not an exceptional or otherwise "atypical" by-product thereof). (Pet. App. 22-23)

In response to a question posed by the district court, petitioner refused to concede the necessity for a sentencing hearing on the credibility of the Church leaders. Petitioner had decisively contradicted each and every factual allegation – *with official Church documents attesting to the patent inaccuracy of the Church Letter.* Petitioner discharged her production burden of countering the "documentary allegations" in the Church Letter with documents whose authenticity and accuracy could not be challenged. Petitioner therefore shifted the burden of production back to the district court to adduce more evidence, and credible proof, of the Church Letter's allegations. When the district court did not produce more evidence or order a hearing, it should have denied its own motion because it failed to discharge its persuasion burden. (Pet. App. 24, 26)

The district court, instead, granted its own motion. It principally relied upon its own institutional experience in finding petitioner's avaricious conduct as "atypical." (Pet. App. 27, 28, 29-34) The district court characterized its grounds (accorded separate but equal weight) as:

(1) the "loss of confidence in an important societal institution as a result of defendant's conduct, an institution which performs an essential function, the care of the needy";

(2) the "disruption in the ability of this institution, as a result of defendant's conduct, to support its ministries at home and abroad"; and

(3) an "abuse of trust so flagrant, and with so many collateral effects, that it is of a kind and degree" not adequately considered by the Commission. (Pet. App. 30-31).

In determining whether the Commission had adequately considered any of these grounds, the district court held that the Commission had not expressly discouraged or forbidden departures, based upon the Church Letter's aggravating factors. (Pet. App. 33) The district court found but one Policy Statement encouraging departure, U.S.S.G. §5K2.7, *Disruption of Governmental Function*, but failed, without giving a reason, to require analogous proofs of a "significant" disruption in the Church's charities and documentation of the "nature and extent" of the disruption. *Id.*

Ruling itself free to depart, the district court granted its own motion and departed upward three levels to Level 24. (Pet. App. 33-34) The district court articulated no reason whatsoever for the amount and extent of the three-level upward departure, which nullified the effect of petitioner's acceptance of responsibility. It represented an approximately 170% increase in the Total Offense Level range from a low of 37 months (Level 21) to a high

of 63 months (Level 24).[1] The five years' sentence placed petitioner's term of imprisonment at the upper end of the Level 24 range. Petitioner is incarcerated.

Petitioner appealed her sentence under 18 U.S.C. §3742(a)(1)-(3) on four separate grounds, one of which is relevant here. The district court abused its discretion in departing upwards three levels because the Guidelines require proof of direct or proximate causation of additional monetary loss or psychological injury and specific intent to cause any non-monetary harm; the Church Letter lacked sufficient indicia of probable accuracy to support its contentions of harm; a three-level departure was unreasonable in placing petitioner on the same level as one who had stolen millions of dollars more than she had embezzled. (Pet. App. 1-4)

The court of appeals denied petitioner's appeal, without opinion, on February 27, 1997. *Id.* Petitioner timely moved for panel rehearing and suggestion for rehearing in banc. Petitioner argued, on the basis of panel comment at the oral argument, that the judgment order had overruled, *sub silentio*, the "structure and theory" approach of the Third and other circuit courts of appeals

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[1] The "punishment differential" for "multiple theft occurrences" and "trust" further increases to well over 200%, when one factors into account that the district court had already adjusted petitioner's offense level by four: a two-level adjustment for "more than minimal planning," U.S.S.G. §2B1.1(b)(4)(A), and a two-level "trust" adjustment, U.S.S.G. §3B1.3. These had the combined effect of an increase, after grouping, in petitioner's adjusted offense level from 17 (24 to 30 months) to 24 (51 to 63 months). "Multiple thefts" and "trust" as "aggravating" factors, therefore, substantially more than *doubled* (and almost *trebled*) petitioner's potential sentence range from 24 to 63 months.

(requiring reasoning to all directly applicable or analogous Guidelines, their Policy Statements, and Commentaries to guide departures and their amount and extent). Petitioner claimed that the court of appeals had misconstrued the precedential effect of this Court's "due deference" review standard, articulated in *Koon v. United States*, 116 S. Ct. 2035 (1996), to require such overruling.

On March 27, 1997, without opinion, the original panel and the court of appeals, sitting *en banc*, respectively denied petitioner's request for panel rehearing and suggestion for rehearing. (Pet. App. 5-6).

Petitioner has filed this petition for writ of certiorari within ninety (90) days of the date of the order denying panel and in banc rehearing.

SUMMARY OF ARGUMENT

The court of appeals erred in affirming, without opinion, the upward departure order under the Theft Guideline as proper as well as its three-level amount and extent as reasonable on the alleged basis of *Koon*.

The district court *ignored* plainly applicable Commission guidance, encouraging departures, for the types of "atypical" harm cited in the Church Letter. *See* U.S.S.G. §2F1.1, *Fraud and Deceit*, Commentary, App. N. 7(c) and 10(a-c) and (e); U.S.S.G. §5K2.4, *Extreme Psychological Injury*, (Policy Statement); and U.S.S.G. §5K2.5, *Property Damage or Loss*, (Policy Statement). These Policy Statements and Commentaries are controlling or authoritative. *See Williams v. United States*, 503 U.S. 193 (1992); *Stinson v. United States*, 508 U.S. 36 (1993). They require proof of (i) specific intent to cause additional monetary and non-monetary harm; (ii) the offense conduct as the cause-in-fact of the atypical injury or its reasonably foreseeable

product; or (iii) demonstrable impact or impairment of functions. The Church Letter, accepted as true for the purposes of this petition, patently lacked all such Commission mandated proof. Had the district court properly determined whether the Commission had adequately considered the harms set forth in the Church Letter, it would have been bound to rule that it lacked power to depart. The district court instead used its own "institutional experience" to classify petitioner's offense conduct as "atypical." This was error.

A district court must adhere to any *binding* requirement, set forth in a Guideline, Policy Statement or authoritative Commentary, that *specific evidence* of an aggravating factor be present to support a finding of "atypical" harm. If that *specific evidence* be lacking, the district court should not depart even if a district court's institutional experience suggests otherwise. The Commission has adequately considered the lesser effects of aggravating factors within the Guideline's Base or Adjusted Offense Level and has determined that they should not provide a basis for departure without specific additional proofs. It follows, by implication, that the Commission *forbids* departures on less weighty grounds.

Such a bright-line ruling by this Court, forbidding departures on less than encouraged grounds, will still permit departures based on aggravating factors or injuries overlooked by the Commission but bar departures on evidentiary grounds other than those required by the Commission.

Compounding the district court's perfunctory departure error was its total failure to provide any reason whatsoever for the amount and extent of departure: three

levels meted out in addition to a six-level upward adjustment for offense and offender related conduct.[2] The resulting Level 24 (*the most severe punishment level for Theft or Fraud offense conduct*) corresponds to a theft of "more than $80,000,000" according to the stipulated Theft Guideline, U.S.S.G. §2B1.1, as well as the analogous Fraud Guideline, U.S.S.G. §2F1.1. Even a Level 22 sentence (achieved after deducting two points for the tax evasion charge) reflects a sentence for a similar first-time offender who had stolen between $20 and $40 million. Especially when, as here, the parties to the Plea Agreement agree the "relevant conduct" to be no less than $1.5 million but no more than $2.2 million, the district court should provide compelling reasons for sentencing a defendant to a prison term that the Commission has determined proper and fitting for a defendant who has stolen, at a minimum, $17.8 million (Level 22) or, at a maximum, $77.8 million (Level 24) more than petitioner embezzled. To put petitioner on the same sentencing plane as either a Level 22 or 24 defendant flies in the face of all reason, absent quantification of corresponding additional losses by the district court. This was reversible *per se* discretionary abuse.

The district court's ruling pushed sentencing disparity, based upon a particular judge's view, through the courthouse's back-door. Petitioner contends that this Court has not left that door ajar. *Koon* did not abrogate, *as the panel below intimated at oral argument*, the "structure

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[2] The district court denied petitioner's request for grouping the embezzlement and tax evasion counts and added two levels to petitioner's offense level. The district court increased petitioner's offense level by four to reflect "more than minimal planning" and "abuse of trust."

and theory" approach of the Third and other circuit courts of appeals. That approach resolves Guidelines questions, arising in the absence of unequivocally applicable Commission directives, by analogy to Guidelines, Policy Statements, and Commentaries other than those directly relevant to the Base Offense Level. This approach furthers the overarching Guidelines goal of sentencing parity.

Even though the Third Circuit court of appeals did not expressly jettison the pre-*Koon* law of "structure and theory," petitioner submits that her sentencing experience will not be unique. Courts of appeals (or dissenting members of panels) have already taken note of the mounting threat of sentencing disparity, arising out of *Koon* analyses which have *ignored* (but not expressly rejected) the "structure and theory" of the Guidelines in favor of an individual judge's sentencing philosophy. On June 5, 1997, the Ninth Circuit, sitting *en banc*, openly held, over vigorous dissent, that *Koon* had overturned settled multiple circuit precedent, requiring a "structure and theory" approach to the reasonableness of departure. *United States v. Sablan*, 1997 WL 297729 (9th Cir. 1997) (*en banc*) (appeal after remand) (cases cited therein). *See also United States v. Horton*, 98 F. 3d 313, 320-1 (7th Cir. 1996) (Evans, C.J., dissenting) (rejecting prior jurisprudence and determining to affirm all departures that are "not totally wacky"). This Court should shut the ersatz-*Koon* door now so that both the Government and the defense may have the Guidelines correctly (and evenly) applied and not selectively (and irrationally) ignored.

Petitioner respectfully requests this Court grant the within petition for a writ of certiorari to provide needed

guidance on these two questions of Guidelines administration and justice.

ARGUMENT

POINT I

THE DISTRICT COURT LACKED POWER TO DEPART ON THE BASIS OF EVIDENCE LESS WEIGHTY THAN THAT REQUIRED BY BINDING POLICY STATEMENTS AND AUTHORITATIVE COMMENTARIES WHICH HAVE ADEQUATELY CONSIDERED THE TYPE OF AGGRAVATING HARM IDENTIFIED BY THE DISTRICT COURT AND HAVE FORBIDDEN, BY IMPLICATION, DEPARTURES ABSENT THAT SPECIAL QUANTUM OF PROOF.

The district court departed upwards from Level 21 to 24 on the ground that no Guidelines provision, other than U.S.S.G. §5K2.7, *Disruption of Governmental Function,* (Policy Statement) provided any colorable evidence of Commission consideration of the Church Letter's allegations of additional monetary, non-monetary, and psychological harm. The district court further concluded, without analysis, that U.S.S.G. §5K2.7 had no applicability even by analogy. Because the district court ignored binding Policy Statements and authoritative Commentaries which require special proof, the district court misapplied the Guidelines, *see Williams,* 503 U.S. 193, and committed *per se* discretionary abuse. *See Koon,* 116 S. Ct. at 2047 (citation omitted). The court of appeals should have vacated the order.

A. *Koon* Pays No Deference To A Departure Analysis That Neglects The "Structure And Theory" Of The Guidelines.

The plain text of 18 U.S.C. §3553(b) commands a district court to sentence a defendant within the Guidelines

range unless the court's review of the Guidelines, their Policy Statements, and Commentaries determines the inadequacy of Commission consideration of "an aggravating or mitigating circumstance of a kind, or to a degree" relied upon by the Commission in formulating the Guidelines. *Id.* The district court must further inquire under the "structure and theory" of the Guidelines whether the Commission has encouraged, discouraged, or forbidden departures on the basis of such aggravating or mitigating circumstances. *Koon*, 116 S. Ct. at 2044, 2045 (applying 18 U.S.C. §3553(b) and construing *United States v. Rivera*, 994 F. 2d 942, 949 (1st Cir. 1993)). *See generally United States v. Valentine*, 100 F. 3d 1209, 1210 (6th Cir. 1996) (interpreting Guidelines like a statute for "structure and theory"); *United States v. Hairston*, 96 F. 3d 102, 105-6 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 956 (1997) (negative §5K2.0 review requires "structure and theory" analysis before departing).

B. The District Court Relied Upon The Church Letter For Departure Grounds Of Additional Monetary Loss Beyond The Amount Embezzled And Non-Monetary (Or Psychological) Harm To Staff, Former Employees, And The Institution Itself.

A proper "structure and theory" *Koon* examination begins with an analysis of the allegedly aggravating (or mitigating) factors, as the case may be. The district court characterized these factors as "loss of confidence" in the Church's eleemosynary ability, a "disruption in the ability of [the Church]" to support charitable activities, and an "abuse of trust so flagrant, and with so many collateral effects" as to be beyond the Commission's consideration.

The district court relied upon two types of evidence of aggravating harm in the Church Letter: monetary (the shortfall in disaster and diocesan contributions) and non-monetary (the psychic impact of the embezzlement upon employees and the institution). The non-monetary harm can also be characterized as "psychological" injury.

The question is: whether or not the Commission adequately considered in binding or authoritative sources of Guidelines, Policy Statements, or official Commentaries additional monetary or non-monetary harm beyond that comprehended by the Base Offense Level.

C. Before Encouraging Upward Departure, The Commission Requires Proof Of Defendant's Special Intent To Risk Additional Property Damage Or Proof Of Offense Conduct As The Proximate Cause Of Additional Monetary Losses.

Petitioner concedes, as the district court apparently found, that the stipulated Guideline, U.S.S.G. §2B1.1, *Larceny, Embezzlement, and Other Forms of Theft*, does not *comprehensively* deal with losses beyond "the value of the property taken, damaged, or destroyed." *Id.* at Commentary, App. N. 1. As the Background to the Commentary makes clear, "[t]he value of the property stolen plays an *important role* in determining sentences for theft and other offenses involving stolen property because it is an indicator of both the harm to the victim and the gain to the defendant." *Id.* at Background (emphasis added).

As for harm beyond the value of the property taken, U.S.S.G. §2B1.1(b)(4)(A) specifically provides for a two-level adjustment for "more than minimal planning." U.S.S.G. §1B1.1, *Application Instructions*, Commentary,

App. Note 1(f) makes clear that "more than minimal planning" subsumes within its definition the repetitive nature of offense conduct. *See also* U.S.S.G. §2B1.1, *Larceny, Embezzlement, and Other Forms of Theft.* Commentary, Background ("[M]ore than minimal planning . . . includes *most* offense behavior involving affirmative acts on multiple occasions.") (emphasis added).

As for petitioner's abuse of her Treasurer position to facilitate and conceal the embezzlement, U.S.S.G. §2B1.1, Commentary, App. N. 14, guides district courts to refer to U.S.S.G. §3B1.3, *Abuse of Position Of Trust Or Use Of A Special Skill,* for a two-level adjustment for embezzlement relating to pension or welfare benefit plans.

Therefore, the district court correctly found no guidance from U.S.S.G. §2B1.1 for Commission consideration of additional or consequential harm to account for injury beyond multiple instances of petitioner's embezzlement and executive opportunity to commit and conceal the crime.

But the district court erred as a matter of law in concluding that the Commission had left it unguided as to additional monetary or consequential harm. The Commission specifically directs district courts to Chapters 3, 4, 5 for "certain factors relevant to the offense that are not covered in specific guidelines to Chapter Two." U.S.S.G., ch. 2, *Offense Conduct,* Intro. Commentary. Such a Commission mandated review shows that both the Policy Statement at U.S.S.G. §5K2.5, *Property Damage or Loss,* and the official Commentary to U.S.S.G. §2F1.1, *Fraud and Deceit,* adequately consider every aspect of the Church Letter's allegations of additional monetary harm. Moreover, both require a specific type and level of proof: *reasonable foreseeability of,* or specific intent to cause, the

additional losses resulting from defendant's offense conduct. U.S.S.G. §5K2.5, *Property Damage or Loss,* (Policy Statement); U.S.S.G. §2F1.1, *Fraud and Deceit,* Commentary, App. N. 7(c).

The Commission expressly considered additional property damage or loss as one of the "factors that the Commission has not been able to take into account fully in formulating the guidelines." U.S.S.G. §5K2.0, *Grounds for Departure,* (Policy Statement). U.S.S.G. §5K2.5, *Property Damage or Loss,* (Policy Statement) does not limit how "the offense caused property damage or loss not taken into account within the guidelines". *Id.* Nor does it specify the "aggravating" factors. However, §5K2.5 guides a district court as to the "extent" of the departure. The offender must have "intended or knowingly risked" the additional harm. *Id.*

Similarly, U.S.S.G. §2F1.1, *Fraud and Deceit,* Commentary, App. N. 7(c), (which also applies to petitioner's 18 U.S.C. §2314 offense conduct)[3] underscores §5K2.5's restrictive approach. The Fraud Commentary explicitly guides district courts to set the Base Offense Level as the result of consequential damages beyond "direct losses." The Commission expressed its "intent" that such consequential losses be *"reasonably foreseeable"* or proximately caused by the offense conduct. *Id.* (emphasis added). Although Application Note 7(c) refers specifically to procurement fraud and product substitution cases, district courts should not restrict Note 7(c) reasoning to defense contractor cases. Absent any Constitutional or statutory

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[3] *Compare* U.S.S.G. §2B1.1, Commentary, Statutory Provisions, *with* U.S.S.G. §2F1.1, Commentary, Statutory Provisions.

conflict or inconsistency with the Guidelines, the Fraud Commentary is a persuasive expression of Commission consideration (or interpretation) of an aggravating factor such as "consequential" damages that "frequently are substantial in [defense contractor] cases." *See Stinson*, 508 U.S. at 45. Its reasoning should be adopted by analogy.

Thus, the "structure and theory" of the Guidelines reveals an "intention" on the part of the Commission that adjustments to reflect additional monetary losses beyond direct damages should entail evidence of specific intent to cause loss or proof of proximate causation.

D. The Commission Requires Proof Of Specific Intent To Cause Non-Monetary Loss Through Psychological Or Non-Psychological Injury.

As for non-monetary loss, the Commission provides several sources of its "intent" other than U.S.S.G. §5K2.7, *Disruption of Governmental Function*, (Policy Statement), to which the district court restricted its cursory review. Both U.S.S.G. §2F1.1, *Fraud and Deceit*, Commentary, App. N. 10, and U.S.S.G. §5K2.3, *Extreme Psychological Injury*, (Policy Statement) directly apply to the Church Letter's allegations of non-monetary injury or psychic impact.

U.S.S.G. §2F1.1, *Fraud and Deceit*, Commentary, App. N. 10, expressly provides for departures for cases "in which the loss . . . does not fully capture the harmfulness and seriousness of the conduct . . . " *Id.* Although not an exhaustive list, several aggravating factors are set forth. Three are relevant to the district court's inquiry. A proponent of a departure motion must show one or more of the following: (i) a primary objective of the fraud to be non-

monetary or to cause or risk "reasonably foreseeable, substantial non-monetary harm," *id.* at Note 10(a); (ii) "reasonably foreseeable, physical or psychological harm or severe emotional trauma" caused by the offense, *id.* at Note 10(c); or (iii) a "loss of confidence in an important institution" caused by the criminal conduct, *id.* at Note 10(e). Thus, the Commission demands at least "but for" or direct causation, if not proximate causation, before encouraging an upward departure for harm greater than that considered under the Base or Adjusted Offense Level.

U.S.S.G. §5K2.3, *Extreme Psychological Injury,* (Policy Statement) provides additional evidence of Commission intent in dealing with amorphous allegations of "psychic" loss or impact. U.S.S.G. §5K2.3 requires that "psychological injury" be "much more serious than that normally resulting from commission of the offense". *Id.* There should normally be (1) "substantial impairment of the intellectual, psychological, emotional, or behavioral functioning of a victim"; (2) probability of the impairment's duration being "extended or continuous," and (3) "physical or psychological symptoms" or "changes in behavior patterns." *Id.*

Finally, U.S.S.G. §5K2.7, *Disruption of Governmental Function,* (Policy Statement) considered in passing by the district court, requires proof of the "disruption" as "significant" and evidence of the "nature and extent of the disruption". *Id.*

E. The Church Letter Lacked, On Its Face, The Quantum Of Specific Proof Of Causation And Intent Required By The Commission To Depart Upwards On The Basis Of The Particular Type Of Additional Harms Cited In The Church Letter.

Even assuming as true each allegation in the Church Letter, the district court lacked the power to depart based upon the aggravating factors of an alleged decrease in disaster fund and diocesan contributions as well as the psychological effect of petitioner's embezzlement upon staff, former employees, and the institution itself. Thus, there was no legal basis upon which to depart for loss of confidence in, or disruption in the charitable function of, the Church, as well as a flagrant abuse of trust.

As for additional monetary harm, the district court made no finding that petitioner intended to cause (or could reasonably foresee her embezzlement as bringing about) a decrease in contributions from a fund from which she did not embezzle or a decline in diocesan support when the Church itself had discouraged such intra-Church transfers since 1990. *Cf.* U.S.S.G. §5K2.5, *Property Damage or Loss,* (Policy Statement) (need for proximate cause or specific intent); *see also* U.S.S.G. §2F1.1, *Fraud and Deceit,* Commentary, App. N. 7(c) (consequential damages). Nor is there a shred of evidence that petitioner intended to cause or knowingly risked harm to the disaster fund or the diocesan largess. *Id.*

The record is similarly bare with respect to the non-monetary or psychological harm to staff and the institution.

First, the Church Letter did not allege, nor did the district court find, petitioner's "*primary* objective" to be

the "non-monetary" harm to staff or the institution. U.S.S.G. §2F1.1, *Fraud and Deceit*, Commentary, App. N. 10(a) (emphasis added). To the contrary, the primary objective of petitioner, according to the district court, was avarice. Petitioner's offense conduct also did not cause or risk "reasonably foreseeable, *substantial* non-monetary harm." *Id.* (emphasis added). Petitioner caused *substantial* monetary harm. There is no allegation that she could reasonably foresee the non-monetary harm or that it would be "substantial."

Second, the Church Letter fails the U.S.S.G. §2F1.1 Commentary test for psychological harm. *Id.* at Note 10(c). There is no proof that "the offense caused reasonably foreseeable, physical or psychological harm, or severe emotional trauma." *Id.* Proximate causation (or specific intent) is missing in this case.

Third, the Church Letter provides no evidence of "direct" or "but for" causation that petitioner's offense "caused a loss of confidence in an important institution." *Id.* at Note 10(e). The Church Letter expressed this factor in monetary terms: the decrease in disaster contributions and the decline in diocesan giving. But the Letter did not aver, as it could not, that "but for" petitioner's embezzlement the faithful would have given more money for disasters or that bishops would have been more generous in giving to the Church's coffers. Absent evidence of an overall decline in giving to all of the Church's appeals, there is no proof that petitioner's embezzlement caused the disaster fund's decline, if any. And the Church itself was discouraging bishops from sending contributions to the Church. One can easily attribute the shortfall in diocesan giving to that cause. Finally, the Church Letter would have to show the loss of confidence as "caused" by

petitioner's conduct. It is equally true, if not compelling so, that the Church executives themselves caused the loss of confidence, if any, by their failure to supervise petitioner – a point noted by petitioner at sentencing.

Fourth, there was no evidence of petitioner's "abuse of trust" as having a "psychic" impact of the magnitude required by U.S.S.G. §5K2.3, *Extreme Psychological Injury*, (Policy Statement) upon the institution, its staff or former employees beyond the normal impact of a scandal. There has to be a finding, in addition to causation, of a "substantial impairment" beyond the expected effect as well as a documentation of duration and manifesting symptoms of such impairment. The fact that discharged employees blame their down-sizing upon petitioner's embezzlement is of no moment. The Church Letter itself ascribes the lay-offs to causes unrelated to the offense conduct. The other evidence proffered in the Church Letter is also unavailing. The demoralization of staff was due to petitioner's management style (as the Church Letter allows) and not her embezzlement, and that style was a direct result of her manic depression. *See* Kay Redfield Jamison, *An Unquiet Mind, A Memoir of Moods and Madness* (Knopf 1995).

Fifth, there is no proof of a "significant" disruption in the Church's eleemosynary function. The district court merely termed it a "disruption" in the Church's discharge of its charitable duties and did not quantify the "nature" or compare the "extent" of the losses, if any, with the status quo pro ante. *See* U.S.S.G. §5K2.7, *Disruption Of Governmental Function*, (Policy Statement).

Thus, there was no encouragement for the district court's departure.

F. The Commission Has Impliedly Forbidden Encouraged Departures On Grounds Less Weighty Than Those Encouraged By The Commission.

The question for this Court is: whether a district court may still depart when the Commission does not *encourage* but does not expressly *forbid* departures on lesser grounds. Petitioner submits that this Court should draw a bright-line forbidding such departures on less than specified evidentiary grounds.

The "structure and theory" of the Guidelines compels the conclusion that the Commission already considered less weighty proof of aggravating factors in its promulgation of Guidelines covering the Base Offense Level and related adjustments. "Abuse of trust" and "more than minimal planning" adjustments play their part, as here, to account for offense conduct greater than that covered by Base Offense but less than that encouraged for departure under official Commentaries or Policy Statements. They are administratively easy to discern and apply.

When encouraging upward departures *in addition to* four levels in adjustments, the Commission has indicated, as discussed above, its intent in *binding* Guidelines and Policy Statements or their *authoritative* counterparts in the Commentaries, that proponents of such motions must adduce special proof of additional monetary and non-monetary harm. *Williams*, 503 U.S. 193 (policy statements as binding); *Stinson*, 508 U.S. 36 (commentaries not at odds with the Constitution, the enabling statutes, or the Guidelines deemed authoritative). *Cf.* U.S.S.G. §1B1.7, *Significance Of Commentary* (commentaries, guiding departures, should have the same binding force and

effect as policy statements). Petitioner's sentencing and appellate objections to lack of intent or non-*post hoc* causation illustrate such presumed Commission judgment of the flimsy, speculative and conclusory allegations, contained in the Church Letter, as *ordinary* incidents of criminal conduct. *See generally* J. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretation of Agency Rules*, 96 Col. L. Rev. 612 (1996). This is especially so when, as here, the departure *nearly doubles* a defendant's Guideline sentence range after adjustment for "abuse of trust" and "more than minimal planning" and *almost trebles* the sentence range with those adjustments. District courts should abjure encouraged departures based on less weighty grounds. *See Stinson*, 508 U.S. 36; *cf. United States v. LaBonte*, 117 S. Ct. 1673 (1997) (rejecting Commission interpretation of "maximum term authorized" under statute as impermissible).

Such a bright-line rule barring departures on less than encouraged evidentiary grounds will prevent perfunctory *Koon* analyses, which have resulted, and will continue to result, in sentencing disparity.

G. This Court Should Rule That District Courts Cannot Substitute Individual Sentencing Philosophy For Guidelines "Structure And Theory."

It is true that no appellate court, even the Third Circuit, has *openly* embraced in a written opinion freedom to depart based solely on "institutional experience" or "sentencing philosophy." *But compare United States v. Brock*, 108 F. 3d 31 (4th Cir. 1997) (affirming downward *Koon* departure for "post offense rehabilitation efforts")

with United States v. Otis, 107 F. 3d 487, 490-92 (7th Cir. 1997) (vacating upward *Koon* departure order because violence not "atypically" associated with narcotics trafficking and "comparatively light" sentence in district court's view no ground for departure). Nevertheless, disparities are arising that beg explanation, as does this case, save by resort to the primacy of district court sentencing philosophy over the "structure and theory," as well as statutory authority, of the Guidelines.[4]

Two recent opinions illustrate the incipient harm of lack of sentencing parity in the district court's invocation of "atypicality" based on its own institutional experience. *United States v. Galante*, 111 F. 3d 1029, 1037 (2d Cir. 1997) (Kearse, C.J., dissenting); *United States v. Pullen*, 89 F. 3d 368 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 706 (1997) (Posner, C.J.).

In *Galante*, Judge Kearse objected to the majority's affirmance of a "family ties" departure because of prison impact on a defendant's family. *Galante*, 111 F. 3d at 1037. She took issue with the majority's view, *id.* at 1029, that

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[4] *See, e.g., United States v. Maden*, 1997 WL 288999 (10th Cir. 1997) (reversing downward departure to make pleading and nonpleading defendants' sentences equal); *United States v. Wilson*, 1997 WL 269332 (4th Cir. 1997) (reversing "family ties" departure after intercircuit survey of "extraordinary" grounds for departure); *United States v. Bristow*, 110 F. 3d 754 (11th Cir. 1997) (reversing downward departure for indigent father's felonious possession of gun solely for the purpose of supporting family obligations); *United States v. Haut*, 107 F. 3d 213 (3d Cir. 1997) (reversing downward departure order based on court's disbelief of Government witnesses); *United States v. Moses*, 106 F. 3d 1273 (6th Cir. 1997) (reversing upward departure to lengthen sentence of dangerous defendant).

appellate courts lacked the requisite institutional sentencing experience to determine an "atypical" family circumstances case from a "heartland" one. Relying upon precedents from district courts, Judge Kearse demonstrated the "typicality" of the "family ties" case before the court of appeals. She further distinguished it from the "non-heartland" departures previously affirmed by other appellate courts. Judge Kearse presciently noted that appellate affirmance of the *Galante* departure, based on the "normal consequences" of a defendant's imprisonment upon his family, augured "disparities in sentencing" or elimination of the "family-impact 'heartland' altogether." *Id.* at 1037, 1039.

Chief Judge Posner similarly raised in *Pullen* the post-*Koon* specter of sentencing disparity arising out of departures based upon conditions of "miserable family history," male gender, or low IQ, predisposing a defendant to crime and relieving him of responsibility. *Pullen*, 89 F. 3d at 370-372. "By this means the guidelines can be unraveled before the eyes of the judge." *Id.* at 371. Chief Judge Posner proposed that resort be had to the Commission, and not to individual judges, to determine the worth of such responsibility-relieving arguments. The panel accordingly affirmed, after a "structure and theory" review of the Guidelines, denial of a downward departure based upon childhood and adolescent sexual abuse of a violent defendant as a "mitigating" factor not considered by the Commission.

Petitioner suggests, based upon the *Galante* dissent and the *Pullen* decision, that her experience with an individual judge's sentencing philosophy will not be unique. *See* n. 4 *supra*. Nor should it be a harbinger of things to

come. Petitioner requests this Court issue a writ of certiorari to uphold the "structure and theory" of the Guidelines and to reverse the judgment of the court of appeals in affirming the district court's order below.

POINT II

THE DISTRICT COURT IMPERMISSIBLY EXERCISED UNFETTERED DISCRETION IN SENTENCING PETITIONER TO THE SAME PRISON TERM AS A HYPOTHETICAL DEFENDANT WHO HAD STOLEN AS MUCH AS $37.8 MILLION MORE THAN PETITIONER HAD EMBEZZLED.

Even though the district court clearly articulated at sentencing its departure as three-leveled, the *written* judgment and conviction order entered July 15, 1996, was silent as to the amount and extent of departure. The omission is telling. The district court gave no reasons whatsoever at sentencing for the three-level adjustment. The court of appeals erred in affirming the district court's sentence as "reasonable" absent any rationale (articulated by the district court or independently assessed by the court of appeals) for the three-level departure. *See Williams*, 503 U.S. at 203-4. Even if the district court had the power to depart, the amount and extent of departure was unreasonable because the district court paid no regard to the factor of sentencing parity to be considered in imposing sentence. 18 U.S.C. §3742(e)(3)(A) (incorporating §3553(a)(6)). The order should be reversed.

This Court has not clearly ruled on the standards of reasonableness of a sentence imposed after proper departure. *Williams* holds that an appellate court lacks power to affirm a partially invalid departure as reasonable without independent assessment of the valid part of a sentence

under the Sentencing Reform Act (the "Act") and the district court's stated reasons for departure. *Id.*, 503 U.S. at 203-4. But *Williams* also defends the Court's traditional deference to the district court as to the appropriateness of a particular sentence, *except as tempered by the Act that commands reasonableness. Id.* at 205. Petitioner respectfully requests this Court clarify how the Act has changed the Court's traditional view.

Petitioner asserts that courts of appeals, including the Third Circuit, have properly looked, pre- and even post-*Koon*, to the "structure and theory" of the Guidelines for analogies to guide "unguided" departures such as those present here. *See, e.g., United States v. Billingsley*, 1997 WL 286132 (7th Cir. 1997); *United States v. Baird*, 109 F. 3d 856 (3d Cir. 1997) (Becker, C.J.) (cases cited therein); *Horton*, 98 F. 3d 313 (cases cited therein); *United States v. Shaw*, 91 F. 3d 86 (9th Cir. 1996).

However, on June 5, 1997, the Ninth Circuit, sitting *en banc*, openly rejected "structure and theory," on a 6 to 5 vote, as "a mechanistic approach to determining whether the extent of a district court's departure was unreasonable." *Sablan*, 1997 WL 287729, at *6. The dissent by Judge Tashima excoriated the "near-absolute, and virtually unreviewable, discretion" the majority had vested in district courts.

> All 138 of the district judges in this circuit will applaud today's majority opinion because, if a ground for departure can be found, it restores to them the *unfettered discretion* in sentencing which, until today, they believed Congress had closely cabined when it passed the Sentencing Reform Act of 1984. I dissent because the majority misreads the Court in

> [*Koon*], and *casts aside the mandate* of the Sentencing Guidelines.

Id. at *7 (emphases added). Judge Tashima tellingly noted that the new standard would apply to "downward departures, as well as to upward departures." *Id.* (citation omitted).

Petitioner submits, along with the *Sablan* dissent, that *Koon* did not overrule the "structure and theory" approach to the amount and extent of departure. Employing such an analytic technique shows that the district court acted unreasonably and that the court of appeals erred in affirming the district court's three-level departure as reasonable.

First, the "structure and theory" of the Theft and Fraud Guidelines demonstrates Commission intent that each single level of additional imprisonment correspond to an ever increasing quantum change in monetary harm. Thus, while the differential between Level 6 and 7 is $1,000, that gap increases to $40 million between Level 23 and 24. *Cf. United States v. MacLeod*, 80 F. 3d 860, 868-69 (3d Cir. 1996) (Becker, C.J.) (analogizing to the incremental approach of the Fraud and Theft Guidelines for guidance in a child pornography case).

Second, the Commission's grouping guidance (relevant here because the district court did not group the two offenses) shows some intent that any increase over the base offense level of a non-grouped count should reflect substantially greater harm. "The rules in this Part seek to provide *incremental* punishment for *significant additional* criminal conduct." U.S.S.G., ch. 3, pt. D, *Intro. Commentary* (emphases added).

Third, the Commission guides district courts to reason by analogy to the Guidelines range for a defendant

with a higher or lower criminal history category before departing upwards or downward to adjust a criminal history category. U.S.S.G. §4A1.3, *Adequacy of Criminal History*, (Policy Statement).

Here, the district court never required itself, as proponent of its own motion, to quantify the additional monetary harms of decline in disaster and diocesan contributions, set forth in the Church Letter. Such a calculation would have yielded a reasonable basis for all three aggravating factors (loss of institutional confidence, impaired eleemosynary ability, and flagrant abuse of trust) cited by the district court. Petitioner's Level 24 sentence equated to a sentence to be meted out to a first-time offender who had stolen $77.8 million more than petitioner had embezzled. Even deducting two levels to account for the effect of the tax evasion charge still places petitioner on an "equal" footing at Level 22 with a defendant who has stolen more than $20 but less than $40 million. Put another way, petitioner received one month of confinement under any Level for every $36,000 embezzled while another defendant, who had stolen $40 million, would have received one month in prison under Level 22 for every $666,666 he had stolen. This is unreasonable.

The district court also did not examine how and why "flagrant" abuse of trust should merit three levels in addition to the two meted out under U.S.S.G. §3B1.3. The collateral effects were primarily monetary. Without quantification, this too was unreasonable.

Absent a "structure and theory" rationale under the Guidelines, the court of appeals should have ruled the amount and extent of the order as *per se* unreasonable. It

did not. The court of appeals erred in affirming the order. It should be reversed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

DIANE K. WEEKS
32 Mercer Street, Suite F-2
Hackensack, NJ 07601

Counsel to Petitioner
Ellen F. Cooke

Of Counsel

CACHERIS & TREANOR
1100 Connecticut Avenue, NW
Washington, DC 20036

Dated: June 25, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-5442

UNITED STATES OF AMERICA

v.

ELLEN F. COOKE,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Criminal No. 96-cr-00043)
District Judge: Hon. Maryanne Trump Barry

Argued February 13, 1997

Before: COWEN, MCKEE and JONES*, *Circuit Judges*

JUDGMENT ORDER

After considering the contentions raised by appellant, to wit:

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*Honorable Nathaniel R. Jones, United States Circuit Judge, U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

1. The court abused its discretion in relying upon the church letter, in departing upward three levels in a "heartland" embezzlement case, and in imposing an unreasonable sentence;

2. Before departing upward, a court must make a refined assessment of the Guidelines and rely solely upon information having sufficient indicia of probable accuracy;

3. The court improperly relied upon the church letter which contained mere allegations and failed to make a *Koon* "refined assessment" of the Guidelines;

4. The government breached its plea agreement with defendant: (a) by bargaining for and accepting a guilty plea based upon a particular mental state and (b) by stipulating to "abuse of trust" and "acceptance of responsibility" stipulations, the substance of all of which the government rejected at sentencing;

5. The plenary review standard applies to breached plea agreement issues;

6. The government cannot repudiate at sentencing its assent to the entry of a guilty plea;

7. The government breached the plea agreement when it disputed at sentencing the factual basis of defendant's plea, whose acceptance it had urged before the court, the adequacy of a two-point adjustment for abuse of trust, and her acceptance of responsibility;

8. The government affirmatively urged the court's acceptance of defendant's plea agreement in full knowledge of her mental state at the time of the commission of the offenses and thereafter breached that agreement in

Dr. Goldstein's report, the government's sentencing memorandum, and its arguments;

9. The government breached its sentencing stipulations of "abuse of trust" and "acceptance of responsibility";

10. The court erred in not making required findings concerning (a) defendant's present and prospective ability to pay $75,000 restitution and (b) loss to victim church which had released defendant from all claims against her prior to sentencing and abused its discretion in the restitution award;

11. A court must determine the amount of the loss as well as a defendant's financial resources and make a realistic assessment of future ability to pay before entering a restitution order;

12. The court failed to make any required findings with respect to the award;

13. The district court erred in not recusing itself *sua sponte* when it appeared to advance the improper goal of punishing defendant for her constitutionally valid Rule 11 plea and when it placed weighty reliance upon extrajudicial reports of domestic terrorism, aimed at churches, in sentencing the defendant, a non-violent former church treasurer with no prior criminal history;

14. The "plenary review" standard applies to recusal motions, even when not made before the court, because of the futility of the action;

15. The court should have recused itself when it displayed, to an objective observer, a bias against defendant based not upon the record but upon scurrilous hearsay attacks by the government and upon inflammatory news reports of church burnings and lootings, unrelated and unconnected to defendant's non-violent offenses of conviction

16. At sentencing, the court gave the appearance of advancing the improper goal of punishing defendant not for her crimes but for the court's erroneous perception of her *mens rea* allocution; and

17. The court improperly relied on extrajudicial sources of church burnings and lootings in sentencing defendant; it is

ADJUDGED AND ORDERED that the judgment of the district court entered on July 16, 1996, be and is hereby affirmed.

ATTEST:

/s/ P. Douglas Sisk
P. Douglas Sisk, Clerk
Dated: FEB 26 1997

By the Court,

/s/ Robert E. Cowen
CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-5442

UNITED STATES OF AMERICA

v.

ELLEN F. COOKE,

Appellant

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, MCKEE and JONES*, *Circuit Judges*

The petition for rehearing filed by appellant having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the

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*Honorable Nathaniel R. Jones, United States Circuit Judge, U.S. Court of Appeals for the Sixth Circuit, vote limited to panel rehearing only.

circuit in regular active service not having voted for rehearing by the court en banc,

the petition for rehearing is denied.

By the Court,

/s/ Robert E. Cowen
Circuit Judge

Dated: MAR 27 1997

UNITED STATES DISTRICT COURT
_____ District of NEW JERSEY

(Filed Jul 15, 1996)

UNITED STATES OF AMERICA

V.

ELLEN COOKE

(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number:
Cr. 96-43

Plato Cacheris, Esq.
Defendant's Attorney

THE DEFENDANT:

[X] pleaded guilty to count(s) 1 and 2 of an Information.

[ ] was found guilty on count(s) _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18:2314 & 2	Interstate Transfer of Stolen Funds	5/10/94	1
26:7201	Tax Evasion	9/2/94	2

Certified as a true copy on
This Date: 7-16-96
By /s/ Jess F. Nelson
( ) Clerk
(x) Deputy

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

[X] It is ordered that the defendant shall pay a special assessment of $ 100., for count(s) 1 & 2, which shall be due [X] immediately [ ] as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: [Deleted]	July 10, 1996 Date of Imposition of Sentence
Defendant's Date of Birth: 12/31/43	/s/ Maryanne Trump Barry Signature of Judicial Officer
Defendant's Mailing Address: 7341 Eldorado Street McLean, Virginia 22102	Maryanne Trump Barry, U.S.D.J. Name & Title of Judicial Officer
Defendant's Residence Address:	July 12, 1996 Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of sixty (60) months on each of Counts One and Two, to be served concurrently.

[X] The court makes the following recommendations to the Bureau of Prisons:

Designate FCI, Alderson, W. Virginia for service of custodial sentence.

[ ] The defendant is remanded to the custody of the United States marshal.

[ ] The defendant shall surrender to the United States marshal for this district,

[ ] at ____ a.m. / p.m. on _____.
[ ] as notified by the United States Marshal.

[X] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,

[X] before 2 p.m. on Aug. 26, 1996.
[ ] as notified by the United States marshal.
[ ] as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years on each of Counts One and Two, all such terms to run concurrently.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[X] The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

[X] The defendant shall not possess a firearm or destructive device.

Based on information presented, the defendant is excused from the mandatory drug testing provision, however, she may be requested to submit to drug testing during the period of supervision if the probation officer determines a risk of substance abuse.

The defendant shall participate in a mental health program for evaluation and/or treatment if directed by the U.S. Probation Office. The defendant shall remain in treatment until satisfactorily discharged and with the approval of the U.S. Probation Office.

The defendant shall provide the U.S. Probation Office with full disclosure of her financial records to include

yearly income tax returns upon the request of the U.S. Probation Office. The defendant shall cooperate with the probation officer in the investigation of her financial dealings and shall provide truthful monthly statements of her income.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled

substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirements.

RESTITUTION AND FORFEITURE

RESTITUTION

[X] The defendant shall make restitution to the following persons in the following amounts:

Name of Payee	Amount of Restitution
The National Episcopal Church Center New York, New York Attn: Arlissa Dean Internal Auditor for Treasurer's Office	$75,000.

Payments of restitution are to be made to:

[ ] the United States Attorney for transfer to the payee(s).

[X] the payee(s).

Restitution shall be paid:

[X] in full immediately.

[ ] in full not later than _____.

[ ] in equal monthly installments over a period of ____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.

[ ] in installments according to the following schedule of payments:

Any unpaid portion shall be paid in equal monthly installments as a condition of supervised release.

Any payment shall be divided proportionately among the payees named unless otherwise specified here.

FORFEITURE

[ ] The defendant is ordered to forfeit the following property to the United States:

STATEMENT OF REASONS

[X] The court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 21

Criminal History Category: I

Imprisonment Range: 37 to 46 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 7,500. to $ 75,000.

[X] Fine is waived or is below the guideline range because of the defendant's inability to pay.

Restitution: $ 75,000.

[X] Full restitution is not ordered for the following reason(s):

Defendant's inability to pay.

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[X] for the following reason(s): (1) Loss of confidence in an important societal institution as a result of defendant's conduct, an institution which performs an essential function – The care of the needy. (2) Disruption in the ability of this institution, as a result of defendant's conduct, to support its ministries at home and abroad. (3) Abuse of trust so flagrant and with so many collateral effects that it was of a kind and degree not adequately considered by the Commission.

Excerpts from the transcript of sentencing on July 10, 1996, are set forth below:

* * *

[p. 26. THE COURT:] Now as you know, I advised you by letter dated July 8th that I was contemplating, on the grounds set forth in the letter that I FAXed to you, that I had just received from Presiding Bishop Edmund L. Browning as lead signatory, that I was contemplating an upward departure for the reasons set forth in that letter.

Now, Mr. Cacheris, I will hear you on that.

MR. CACHERIS: Yes. May the court indulge me a moment.

Your Honor, first, I appreciate the fact that you sent us this letter on July 8th. I don't appreciate the contents of the letter, I'm sure you'll understand that. And in my remarks, it is not my intention to be critical of either the church or any of its members, including the Presiding Bishop. But I have a duty here to defend a client, and the court has indicated, based on this letter you're asking me to address, that you are contemplating an upward departure because of the letter.

We sincerely hope that with the conclusion of this presentation, that you will not find that the letter has a insufficient indicia of reliability to support its probably accuracy, as is required under New Jersey law, so that you would not indulge in an upward departure.

Let me make some comments about the letter, if I may, You Honor. Again, these are comments that are

made by [p. 27] a lawyer in defense of his client and I think are mandated.

First of all, the letter is a letter. It is neither an affidavit nor sworn testimony, and we suggest consists of unsubstantiated allegations. For example, Your Honor, to say that a decline, as the letter does, in contributions received by the Presiding Bishop's Fund for World Relief was caused by Mrs. Cooke's actions, we think is wrong. Income for this fund that they are talking about, this World Relief Fund, is directly related to world disasters. In other words, when there's an earthquake, as there was in California two years ago, there are appeals made and people contribute to those appeals. And therefore, the funds do feed off of disasters.

Mrs. Cooke did not take any funds from this fund anyway. But more importantly, there is a report that I have here, Your Honor, called the 1995 Annual Report for the Presiding Bishop's Fund for World Relief. I would be more than happy to place it in evidence, but I want to read to you that for the year 1995, which is one of the years in question, in fact crucial year, they received from the church, and you don't have this in their letter this is one of my complaints. You have no – absolutely no facts. This letter has no figures. This letter merely makes allegations and asks Your Honor to leap to conclusions based on these allegations.

[p. 28] For the year 1995, income for this particular fund, was $3,804,345. And then there's a list of disbursements. But the significant factor is that at the end of the year, there is a balance left in this fund that they tried to

attribute to Mrs. Cooke, improperly we say, of $417,835 still remaining in this fund.

THE COURT: It makes very clear no funds were taken from contributions received from the Fund for World Relief.

MR. CACHERIS: That's true.

THE COURT: He's not suggesting that.

MR. CACHERIS: That is true. But they are saying, as I understand this letter, they are saying that they have, the funds have declined because of a lack of trust.

THE COURT: All right.

Now, what's the date of that report you're reading from?

MR. CACHERIS: This report is dated 1995.

THE COURT: All right.

Now she pled guilty in 1996.

MR. CACHERIS: Yes.

THE COURT: And he's talking about contributions during this past calendar year have declined.

MR. CACHERIS: It would have to be.

THE COURT: That's irrelevant.

[p. 29] MR. CACHERIS: Well, it would be –

THE COURT: That's a year early.

MR. CACHERIS: I would think it would have to be year '95.

THE COURT: Whatever. She only pled guilty in 1996, in January of 1996, this year.

MR. CACHERIS: But –

THE COURT: And that's a 1995 report.

MR. CACHERIS: Yes.

THE COURT: How does that help?

MR. CACHERIS: Well, let me say that in January of 1995, when Mrs. Cooke was terminated in January of 1995, terminated by the church, with great publicity, the facts of this case were publicized throughout the world.

THE COURT: Okay.

MR. CACHERIS: So while the report is dated in 1995, and therefore deals with the calendar year 1995 as Your Honor is saying, in January of 1995, it was well-known throughout the world that Mrs. Cooke had indulged in the –

THE COURT: All right.

What is the date of this report in January 1995?

MR. CACHERIS: That I cannot tell you. We believe it came out in '96, Your Honor. But we can not give you a date. I cannot be accurate about that.

All I can say is that these are figures that [p. 30] come from the church, from their own publications, dated 1995.

So we, based on that, suggest that you should not credit any impropriety on Mrs. Cooke for this World Relief Fund. We don't think the fund has suffered, and any time there's a disaster, people rally to it.

THE COURT: What about the rest of the things?

MR. CACHERIS: I'm about to get to that.

THE COURT: The rest of the –

MR. CACHERIS: The diocesan – the next paragraph deals with allegations that the diocesan councils responsible for determining the level of giving to the national church have indicated a reluctance to give due to mistrust of the national church.

Our response to that –

THE COURT: Well, "mistrust of our ability to manage the funds we receive."

MR. CACHERIS: Yes. Yes.

THE COURT: Not surprising.

MR. CACHERIS: Yes.

Well, any time there are allegations of this kind people are going to have mistrust.

THE COURT: It's not allegations, it's conceded criminal activity, where 2.2 million was looted from the church. So that's more than an allegation.

[p. 31] MR. CACHERIS: That is true. However, we understand, and I will give you the citation to it, that the diocese began to withhold funds from the church in 1990, wholly apart from anything Mrs. Cooke is alleged to have done.

As part of attempts by the Episcopal Church to decentralize, the budget handbook for the 19 – the 71st General Convention specifically addressed at pages 19 to

25, the implementation of a decentralized funding system.

The point I'm making here, Your Honor, is that the church itself was encouraging diocese to keep their funds within the diocese and, therefore, the allegation that the diocese were cutting back contributions to the national church because of Mrs. Cooke's activities, we think is improper and we think should not be credited by the court.

Now, the fact is, as the next paragraph, that Mrs. Cooke did take funds from the presiding Bishop's Discretionary Fund, we do not dispute that that's the plea she took, that's what the court's finding was.

On the last page, Your Honor, is a paragraph speaking about the psyche – excuse me, psychic impact on the staff and organization, and they say, Your Honor, that this has been more debilitating – more debilitating than the financial impact. They complain about her high-handed attitude, control needs, and that she, by these activities, [p. 32] destroyed creativity and morale of many staff members.

I want to point out, and I know you've ruled on the issue of her diminished capacity, but these very same characteristics are the ones that we have urged upon the court, to find that there was a personality disorder, her high-handed attitude and control needs.

THE COURT: What do you mean? Everybody who has a high-handed attitude –

MR. CACHERIS: No – no, Your Honor.

THE COURT: – has a significantly reduced mental capacity?

MR. CACHERIS: No – no. I haven't said –

THE COURT: Half the people in this room –

MR. CACHERIS: – and I'm just saying that this is interesting, because it is a characteristic Dr. White cited in support of his diagnosis of her personality disorder. That's all we're saying.

THE COURT: All right. Okay.

MR. CACHERIS: And I'm also saying, Your Honor, the people – five of the seven people that authored this letter apparently were on the scene, were on watch during all of these activities that they're now complaining about, her attitude, her control needs. They were there. They did nothing – nothing. To – to redress these now these belated complaints.

[p. 33] So, in sum, we think the letter that Your Honor sent us on July the 8th should not be a basis for you to upwardly depart in the sentence you're about to impose on Mrs. Cooke.

THE COURT: All right.

You say that this is a letter and not an affidavit or sworn testimony, and you're quite correct. And you say there are unsubstantiated allegations coming from – let me just make certain the record is clear on this. A letter signed by The Most Reverend Edmund L. Browning, Presiding Bishop, President of the Domestic and Foreign Missionary Society; Pamela P. Chinnis, President of the House of Deputies of the General Convention; Diane M.

Porter, Vice-President of the Domestic and Foreign Missionary Society; the Reverend Canon Donald Nickerson, Secretary of the Domestic and Foreign Missionary Society; Steven Duggan, Treasurer of the Domestic and Foreign Missionary Society; the Right Reverend Charlie McNutt, Chief Operating Officer of the Episcopal Church, and the Reverend Canon Richard S. O. Chang, Executive of Administration, the Office of the Presiding Bishop.

You're suggesting that these these are unsubstantiated allegations coming from these people who I guess are the leaders of the Episcopal Church in the United States. Do you want a sentencing hearing?

[p. 34] MR. CACHERIS: Do I want a sentencing hearing on this issue?

THE COURT: So that I can make a credibility call.

MR. CACHERIS: Well, no, I'm just saying –

THE COURT: And have them support what you say are unsupported allegations?

MR. CACHERIS: I'm saying that the letter that Your Honor has received –

THE COURT: It's a letter.

MR. CACHERIS: – comes from people who are, as you've described them, they're eminent people, there's no question about that.

THE COURT: Yes.

MR. CACHERIS: I don't dispute that.

What I'm saying is they did not provide the court with any particulars upon which you can make the upward departure.

I would also point out that they cite the diocese activities, withholding funds from the church, but here are over a hundred diocese in the Episcopal Church, and not one of them has written to support what's in this letter.

THE COURT: How would we know? I mean I just got the letter on Monday. Do you want me to poll the diocese? I mean –

MR. CACHERIS: No, I'm not saying that. If they [p. 35] were going to write this letter I'm saying they could have been more precise. That's all I'm saying, they're not the precise enough.

THE COURT: They could be speaking with precision.

Let me ask you a question, because I guess I'm obsessive-compulsive. I saw something in Dr. Goldstein's report, this is very parenthetical to what we have –

MR. CACHERIS: Yes. Yes.

THE COURT: – did your client really file, her and her husband, really file counterclaims against the church, alleging misrepresentation of the position, negligent management, a hostile work environment, a chaotic work environment, and stylistic differences in personal and professional relationships after she was caught?

MR. CACHERIS: Nothing like that was ever filed to my knowledge.

My I consult with my co-counsel and my client?

THE COURT; Please. I understand it was a counterclaim to one of the churches for civil damages.

(Conferring).

MR. CACHERIS: Never filed, Your Honor.

THE COURT: All right.

MR. CACHERIS: That is, I'm telling you on advice and information I'm getting right at the moment, you asked me the question, it was foreign to me, because I never heard [p. 36] of it before.

THE COURT: Let me ask you again. Do you wish, do you believe that I require substantiation of the allegations contained in this letter at a sentencing hearing?

MR. CACHERIS: At a separate sentencing hearing?

THE COURT: I would have to adjourn this if you're looking for substantiation.

MR. CACHERIS: May I consult with my client?

THE COURT: Yes.

(Conferring).

MR. CACHERIS: I have consulted, Your Honor, and I think it is a decision I had to consult with my client, I beg the court's forebearance for doing that. She does not require a sentencing hearing on this issue.

THE COURT: Mr. Ernst, what is your position on this potential upward departure?

MR. ERNST: Your Honor, the parties in their plea agreement did reach certain stipulations. The plea agreement that we reached with the defendant does not provide for our requesting an upward departure, therefore, I'm not requesting an upward departure, not taking a position.

I do want to make a few observations though. The first is that I think it's clear that legally the court would have the discretion to depart under these [p. 37] circumstances, particularly under note 10 E to the fraud guidelines, which are analagous to this case, which permit an upward departure where the offense caused the loss of confidence in an important institution.

I want to respond to some – Mr. Cacheris' comments in that regard, because I think they're pertinent not only to a potential upward departure motion, but to sentencing even within the guideline range.

I think it's clear here that where a very senior official of an important institution such as the church, embezzles 2.2 million dollars, that that embezzlement will have very severe consequences not only with respect to the particular individual who stole the money, but with respect to the institution as a whole. People trust or certainly want to trust their leaders. And when their trust is abused, as it was in this case, the likely consequence is to lose confidence not only in that leader, but to some degree in the institution as a whole. The institution, right or wrong, is held accountable for a breach of trust like that.

I think that the normal inferences that the court could draw in this case, matched with the letter, and even with

Dr. Goldstein's report, because Dr. Goldstein has interviewed former parishioners from St. Luke's, and I know that comments have been conveyed to her about a loss of confidence and so forth, that I think the court could draw [p. 38] the inference, whether it's relevant to an upward departure motion or sentencing –

THE COURT: Well, let me interrupt you on that. It is clear, under the case law and under the guidelines themselves, that when there is a potential upward departure contemplated by the court, that the defendant, and I suppose anyone is entitled to know in advance, it could even be the sentencing hearing, the ground for potential contemplated upward adjustment. So to the extent that you would suggest – and you're not suggesting, I suppose you don't mean to be suggesting that there should be an upward departure at all, because you've taken no position on it, to inform my thinking I don't want to think about anything that isn't part of this notification that I gave counsel in my letter.

MR. ERNST: What I'm suggesting though, Your Honor, is I think the court can bring its normal experience and inferences to bear on this letter. And again, I'm not necessarily arguing in favor of the upward departure motion as just the sentencing in general. But I think the court can bring its experience and inferences to bear on this letter and infer that an institution like the church would suffer a loss of confidence under these circumstances. That's all I was suggesting.

THE COURT: I'm not sure I would need even a letter [p. 39] for any of that.

MR. ERNST: Exactly.

THE COURT: Yes.

MR. CACHERIS: Any institution, Your Honor, is going to suffer a loss of confidence.

THE COURT: Except it's different, isn't it, when you're dealing with something – and I don't mean to hold a church necessarily to a higher level than any charitable institution, although I guess I can't help but think that some things should be sacred, but anyway it's different than a bank.

MR. CACHERIS: Well –

THE COURT: It's different than a teller taking 10,000 bucks out of an account.

MR. CACHERIS: Your Honor, banks fail, churches don't. The church will survive. That's my opinion.

THE COURT: Well, some churches do fail.

MR. CACHERIS: Well, this one won't, in my opinion.

THE COURT: Well, that's not a defense of this woman, "the church won't fail." How can that be a defense, just because the church won't fail?

No, I don't think it will fail.

But – even without this letter, this is common sense stuff. It's not startling.

I have rarely ordered an upward departure. In [p. 40] fact, in the ten years since the guidelines have been in effect, I can count my upward departures on the fingers

of one hand. But in my mind, this, and the circumstances I will now discuss briefly, scream for an upward departure.

This is an atypical case, because I find that there exists an aggravating circumstance of a kind not adequately taken into consideration by the Sentencing Commission in formulating the guidelines, a circumstance that should result in a sentence different from that described in the guideline range I have earlier found.

The Supreme Court, in the recent *Koon* case, cited approvingly, the questions then Chief Judge Brier stated in *U.S. v. Rivera*, 924 F.2d 942 at 949 (First Circuit 1993), that a sentencing court considering a departure should ask.

The first question is: What features of this case potentially take it outside the guidelines heartland and make of it a special and unusual case?

Now, perhaps the looting of a church alone would be enough, certainly the example set forth in 2 B 1.1, that embezzlement of a bank, for example, or the U.S. mails, or pickpocketing or stolen vehicles, are vastly different in character than the looting of a church. But I do not rely on this ground.

Rather, I rely first on the loss of confidence in an important societal institution as a result of defendant's [p. 41] conduct, an institution which performs an essential function, the care of the needy.

Second, I rely on the disruption in the ability of this institution, as a result of defendant's conduct, to support its ministries at home and abroad.

And third, I rely on an abuse of trust so flagrant, and with so many collateral effects, that it is of a kind and degree not considered by the Sentencing Commission and could not have been adequately considered by the Sentencing Commission in formulating the guidelines.

I will explain the reasons for these grounds by reading most of the letter which we have discussed, which articulates better than I can the reasons for my upward departure.

"Your Honor, we are members and officers of the Domestic and Foreign Missionaries Society, the corporate entity that embraces all persons who are members of the Episcopal Church, and we are members of the Senior Executive Group of the Presiding Bishop of the Episcopal Church. All but two of us have served with Mrs. Cooke, therefore we are in a position to comment on her impact on the church, both during the time of her employment and during the aftermath of the discovery of her crime.

"To assess the impact of Mrs. Cooke's actions on the Episcopal Church we must look beyond the immediate [p. 42] confines of the national church headquarters, because trust at all levels of church life has been violated. When we received the 'widow's mite' given out of love, not abundance, it is expected that the monies coming to support our ministries will be used to provide assistance at home and throughout the world. Our ability to provide ministry has been hampered by this violation of trust. For example, while no funds were taken from contributions received by the Presiding Bishop's fund for World Relief, contributions during this past calendar year have declined due to a lack of trust created by this event. This

fund represents the way that Episcopalians collectively make a financial response to disasters such as floods, earthquakes, civil unrest, and most recently, the burning of Black churches.

"In many instances, diocesan councils and committees responsible for determining the level of giving to the national church operations have indicated a reluctance to support our operations due to their mistrust of our ability to manage the funds we receive, thereby limiting our ability to assist our long term partners such as the Church in Liberia, the Diocese of Haiti, the Episcopal Church in the Philippines, just to name a few of the most needy among us. We even have heard from others in the ecumenical community, that their contributions have suffered because of the ripple effect of Mrs. Cooke's [p. 43] actions.

"The Presiding Bishop's Discretionary Fund as distinguished from the Presiding Bishop's Fund for World Relief was established to meet the immediate pastoral and personal needs of members of our church and others at the discretion of the Presiding Bishop. To remove funds from that account was heinous, because it limited the Presiding Bishop's ability to help the most vulnerable among us. To use money from this fund to support a lavish Pharisean life style is the antithesis of the most basic teaching and tenets of our faith. While holding herself out as a holy and self-righteous person, she ascribed to herself emoluments denied to other staff members and their families.

"The psychic impact on our staff and organization has been more debilitating than the financial impact. Her

high-handed attitude and control needs destroyed the creativity and morale of many staff members, and our internal healing processes continue to be slow and deliberate. Former staff members downsized due to economic retrenchment cannot be convinced that there is no direct correlation between her actions and the loss of their employment. Healing has yet to begin for many of these people. Beneficiaries of ministry programs that have been closed due to declining income share the same impression and still feel abandoned by this church."

[p. 44] Those are the reasons which support my three bases for an upward departure.

The second question that Judge Brier, then Chief Judge Brier would have a sentencing court ask is: Has the Sentencing Commission forbidden departures based on what I have described? Answer: No.

Third question: If not, has the Commission encouraged departures based on what I have described? "Not explicitly. Although the Commission has encouraged departures for disruption of the governmental function in 5 K 2.7, to which at least loose analogy can be made.

And if not, – question four, has the Commission discouraged departures based on what I have described? The answer is no.

Therefore, after considering the structure of the theory of both relevant individual guidelines and the guidelines taken as a whole, as both *Rivera* and *Koon* instruct that I do, this court has determined that the aggravating circumstances I have described takes this case out of the guidelines heartland, and I will depart upward three

levels, to the total offense level of 24 and a guideline imprisonment range of 51 to 63 months.

Let me make it quite clear, that while I have articulated three different grounds for the upward departure of three levels, I would find, if required to find, that any [p. 45] one of these grounds would warrant the three level upward.

We will take a 10-minute break and then I will go into the sentencing.

THE CLERK: All rise, please.

(After a brief recess court resumed).

THE COURT: Be seated, please.

As a result of the upward departure, the defendant's guideline sentencing range is 51 to 63 months.

Mr. Cacheris, do you wish to speak on behalf of your client?

MR. CACHERIS: Yes, Your Honor.

THE COURT: You may proceed.

MR. CACHERIS: Despite what's been said here and what Mrs. Cooke has pled guilty to, in the final analysis she's a fundamentally good lady, a good person, a devoted mother, a devoted wife, she's decent and responsible.

You have received numerous letters on her behalf, people who know her and have spoken well of her. She has done many commendable things in her life. Unfortunately, she suffers from this illness, which the court

found was not sufficient to give her a departure, but which is an illness that she endures.

Under all of the circumstances of the case, given the fact the court has departed upward, I respectfully ask the court not to inflict further punishment than the minimum [p. 46] 51 months that the new range calls for.

THE COURT: Thank you.

Mrs. Cooke, would you like to speak in your own behalf?

MRS. COOKE: No, Your Honor.

THE COURT: Mr. Ernst.

MR. ERNST: Your Honor, we've discussed a number of the factors and we believe – already have discussed the factors we believe the court ought to consider in imposing sentence. They include the effect on the church, obviously, it was both financial in the sense that the money stolen was destined for good works, good works that could not be done as a result of the embezzlement; we've discussed the non-financial effect on the church.

There's another issue that I think is appropriate for the court to consider in imposing sentence, and that is in a sense the attempt to make the victim, the church, to further victimize the church in Mrs. Cooke's public statements, in the psychiatrist's submission, in a sense she has sought to blame the church for leading her to commit this crime. Obviously, there's no evidence that that in fact did happen. But that's another factor the court ought to consider in imposing sentence, that fact, that in a sense to the end Mrs. Cooke has looked for a scapegoat for her crime,

and that in a fundamental way she really hasn't fully [p. 47] admitted the facts of the crime and her wrongdoing. We've discussed her motion for a downward departure, her claim that she couldn't remember, which really has no basis.

We would simply ask that the court impose a sentence within the guidelines and consider all of those relevant factors.

THE COURT: Mr. Ernst is correct when he says, essentially said, after one goes through the permutations and combinations and departure motions, objections, to finally reach the appropriate guideline range, there is not a lot left to say. Because most of it has been said.

But I would just make a few remarks.

This defendant deliberately and meticulously, and with knowledge then and now, looted the national church over a period of years, for one reason and for one reason only: To live the life of someone she was not. I mean the only difference between this defendant and a common thief is that this defendant did not wear a mask or use a gun. And she did not need to, of course, because of the trust the church had reposed in her. And as a result of that trust, the church has suffered, the clergy and members of the church have suffered, the church's ministry to people in need has been impacted.

As I've considered this sentence, and I've spent a lot of time on it, the thought that most occurs to me is [p. 48] there's nothing sacred anymore. You see today the burning of churches; the looting of churches; the lack of respect for values and institutions that formerly we held

dear. And more often than not today, there are – or we see increasingly, as we see here, the refusal to accept responsibility for one's acts, rather, blaming everyone and everything but one's self, and relying, as here, on the spurious psychiatric defenses, which the defendant believed required a feigned, albeit selective loss of memory. I condemn this crime and the greed which caused the crime.

Will the defendant please rise.

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the court that the defendant, Ellen F. Cooke, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 60 months on each of Counts 1 and 2, to be served concurrently.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of three years. This term consists of terms of three years on each of Counts 1 and 2, all such terms to run concurrently.

Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in the district to which the defendant is released. While on supervised release, the defendant shall not commit another federal, state or local crime, [p. 49] shall be prohibited from possessing a firearm or other dangerous device, shall not possess an illegal controlled substance, and shall comply with the standard conditions that have been adopted by this court.

Based on information presented, the defendant is excused from the mandatory drug testing provision. However, she may be requested to submit to drug testing

during the period of supervision if the probation officer determines a risk of substance abuse. In addition, the defendant shall comply with the following special conditions: The defendant shall participate in a mental health program for evaluation and/or treatment, if directed by the U.S. Probation Office. The defendant shall remain in treatment until satisfactorily discharged and with the approval of the U.S. Probation Office.

2. The defendant shall provide the U.S. Probation Office with full disclosure of her financial records, to include yearly income tax returns, upon the request of the U.S. Probation Office. The defendant shall cooperate with the probation officer in the investigation of her financial dealings and shall provide truthful monthly statements of her income.

It is further ordered that the defendant make restitution to the National Episcopal Church Center, New York, New York, Attention: Arlissa Dean, Internal Auditor [p. 50] for the Treasurer's Office in the amount of $75,000 which shall be due immediately.

Any unpaid portion shall be paid in equal monthly installments as a condition of supervised release. The court finds the defendant does not have the ability to pay a fine, the court will waive a fine in this case.

It is further ordered that the defendant shall pay to the United States a special assessment of $100, which shall be due immediately.

You have a right to appeal this sentence, Mrs. Cooke, if you cannot afford an attorney one will be appointed for you. Notice of appeal must be filed within 10 days.

Is there anything else, counsel?

MR. CACHERIS: Yes, Your Honor.

Would the court permit Mrs. Cooke to self-surrender at the pleasure of the Bureau of Prisons?

THE COURT: Would you give me a date, Miss Fenzel, please.

THE CLERK: August 26th.

THE COURT: August 26th, 1996, she may self surrender.

MR. CACHERIS: August 26th.

THE COURT: 26th.

MR. CACHERIS: Would the court, and I realize the [p. 51] court cannot designate an institution, but would the court recommend to the Bureau of Prisons that the sentence to be served at Alderson, West Virginia, which is a Federal Correctional Institute for woman [sic] that is in close proximity to her home?

THE COURT: I will recommend that.

MR. CACHERIS: Thank you.

THE COURT: Anything else, Mr. Ernst?

MR. ERNST: No, Your Honor.

THE COURT: Thank you.

THE CLERK: All rise, please.

Title 18, United States Code, Section 3553 relevantly provides:

(a) Factors to be considered in imposing a sentence. – The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United

States Code, and that are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence. – The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case

of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(c) Statement of reasons for imposing a sentence. – The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence –

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described.

Title 18, United States Code, Section 3742 provides in pertinent part:

(f) Decision and disposition. – If the court of appeals determines that the sentence –

(1) was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) is outside the applicable guideline range and is unreasonable or was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and –

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(3) is not described in paragraph (1) or (2), it shall affirm the sentence.

U.S.S.G. § 1B1.7, Significance of Commentary, relevantly provides:

§ 1B1.7. Significance of Commentary

The Commentary that accompanies the guideline sections may serve a number of purposes. First, it may interpret the guideline or explain how it is to be applied. Failure to follow such commentary could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal. *See* 18 U.S.C. § 3742. Second, the commentary may suggest circumstances which, in the view of the Commission, may warrant departure from the guidelines. Such commentary is to be treated as the legal equivalent of a policy statement. Finally, the commentary may provide background information, including factors considered in promulgating the guideline or reasons underlying promulgation of the guideline. As with a policy statement, such commentary may provide guidance in assessing the reasonableness of any departure from the guidelines.

U.S.S.G. § 2F1.1, Commentary, Application Notes 7(c) and 10 provide:

7(c) Consequential Damages in Procurement Fraud and Product Substitution Cases

In contrast to other types of cases, loss in a procurement fraud or product substitution case includes not only direct damages, but also consequential damages that were reasonably foreseeable. For example, in a case involving a defense product substitution offense, the loss includes the government's reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered or retrofitting the product so that it can be used for its intended purpose, plus the government's reasonably foreseeable cost of rectifying the actual or potential disruption to government operations caused by the product substitution. Similarly, in the case of fraud affecting a defense contract award, loss includes the reasonably foreseeable administrative cost to the government and other participants of repeating or correcting the procurement action affected, plus any increased cost to procure the product or service involved that was reasonably foreseeable. Inclusion of reasonably foreseeable consequential damages directly in the calculation of loss in procurement fraud and product substitution cases reflects that such damages frequently are substantial in such cases.

10. In cases in which the loss determined under subsection (b)(1) does not fully capture the harmfulness and seriousness of the conduct, an upward departure may be warranted. Examples may include the following:

    (a) a primary objective of the fraud was non-monetary; or the fraud caused or risked reasonably foreseeable, substantial non-monetary harm;
    (b) false statements were made for the purpose of facilitating some other crime;
    (c) the offense caused reasonably foreseeable, physical or psychological harm or severe emotional trauma;
    (d) the offense endangered national security or military readiness;
    (e) the offense caused a loss of confidence in an important institution;
    (f) the offense involved the knowing endangerment of the solvency of one or more victims.

U.S.S.G. § 5K2.3 provides:

§5K2.3. Extreme Psychological Injury (Policy Statement)

If a victim or victims suffered psychological injury much more serious than that normally resulting from commission of the offense, the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the severity of the psychological injury and the extent to which the injury was intended or knowingly risked.

Normally, psychological injury would be sufficiently severe to warrant application of this adjustment only when there is a substantial impairment of the intellectual, psychological, emotional, or behavioral functioning of a victim, when the impairment is likely to be of an extended or continuous duration, and when the impairment manifests itself by physical or psychological symptoms or by changes in behavior patterns. The court should consider the extent to which such harm was likely, given the nature of the defendant's conduct.

U.S.S.G. § 5K2.5 provides:

§5K2.5. Property Damage or Loss (Policy Statement)

If the offense cause property damage or loss not taken into account within the guidelines, the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the extent to which the harm was intended or knowingly risked and on the extent to which the harm to property is more serious than other harm

caused or risked by the conduct relevant to the offense of conviction.

§5K2.7. Disruption of Governmental Function (Policy Statement)

If the defendant's conduct resulted in a significant disruption of a governmental function, the court may increase the sentence above the authorized guideline range to reflect the nature and extent of the disruption and the importance of the governmental function affected. Departure from the guidelines ordinarily would not be justified when the offense of conviction is an offense such as bribery or obstruction of justice; in such cases interference with a governmental function is inherent in the offense, and unless the circumstances are unusual the guidelines will reflect the appropriate punishment for such interference.

PLEA AGREEMENT WITH ELLEN COOKE

Schedule A

The United States and Ellen Cooke agree to stipulate at sentencing to the statements set forth below, subject to the conditions in the attached plea agreement.

1. The appropriate sentencing guideline calculation for the offense charged in Count One of the Information is as follows:

(a) The base offense level is four (4). *See* United States Sentencing Commission, *Guideline Manual* (Nov. 1994) ("U.S.S.G.") § 2B1.1.

(b) The loss attributable to the offense charged in Count One is more than $1,500,000 but less than $2,500,000, resulting in an increase of fourteen (14) levels. *See* U.S.S.G. § 2B1.1(b)(1)(O).

(c) Ellen Cooke abused a position of private trust and used a special skill in a manner that significantly facilitated the commission and concealment of the offense charged in Count One, resulting in an increase of two (2) levels. *See* U.S.S.G. § 3B1.3.

(d) The offense involved more than minimal planning, resulting in an increase of two (2) levels. *See* U.S.S.G. § 2B1.1(b)(5)(A).

(e) The total offense level applicable to Count One is twenty-two (22).

2. The appropriate sentencing guideline calculation for the offense charged in Count Two of the Information is as follows:

(a) The tax loss for the years 1990 through 1993 is more than $325,000, but less than $550,000, resulting in a base offense level of seventeen (17). *See* U.S.S.G. §§ 2T1.1(a)(1) and 2T4.1(L).

(b) Ellen Cooke failed to report income from criminal activity exceeding $10,000 in each of the years 1990 through 1993, resulting in a increase of two (2) levels. *See* U.S.S.G. § 2T1.1(b)(1).

(c) The total offense level for the offense charged in Count Two is nineteen (19).

3. The parties each reserve the right to argue as to whether counts One and Two should be grouped pursuant to U.S.S.G. § 3D1.2.

4. As of the date of this agreement, Ellen Cooke has clearly demonstrated a recognition and affirmative acceptance of personal responsibility for the offenses charged. Therefore, a downward adjustment of two (2) levels for acceptance of responsibility is appropriate if Cooke's acceptance of responsibility continues through the date of sentencing. U.S.S.G. § 3E1.1(a). Moreover, Ellen Cooke timely notified authorities of her intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial of Cooke and permitting the court to allocate its resources efficiently; an additional downward adjustment of one (1) level is therefore appropriate. *See* U.S.S.G. section 3E1.1(b).

The last paragraph of the Church Letter, not read into the record by the district court, is set forth below.

Your Honor, we cannot stand in your shoes as you determine the sentence to be meted out but we offer a final comment. While we have no desire for retribution and the imposition of more hurt on Mrs. Cooke's family, it, nevertheless, is our collective belief that a lenient sentence would add further to the damages that we have suffered because many in both Church and society are looking for a just and equitable end to this sorry chapter in our history. There can be no appearance that equal justice under the law did not prevail if full healing and recovery is to begin among our staff and members.